IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-448

NATIONAL AIRLINES, INC., *Petitioner,*
v.
CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT WESTERN AIR LINES, INC., IN OPPOSITION

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Respondent, Western Air Lines, Inc. (Western), requests that the petition for writ of certiorari by Petitioner, National Airlines, Inc. (National), to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case be denied.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been officially reported, appears at Appendix A of

the petition. Orders 76-3-93 (March 15, 1976) and 76-6-120 (June 16, 1976) of the Civil Aeronautics Board (the Board), which constitute its decisions in the *Miami-Los Angeles Competitive Nonstop Case* and which were under review by the Court of Appeals, are found in Appendices B and C, respectively, of the Petition.[1]

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Court of Appeals, having found that the Board committed procedural error on the issue of carrier selection in a route proceeding, may properly remand only that part of the Board's order.

STATEMENT OF THE CASE

This case arises from the continuing efforts of the Board to ensure the provision of adequate air service between Miami and Los Angeles. In the Board's earlier decision with respect to this route in 1969, it determined that service in addition to that provided by National was required by the public convenience and necessity and that Northeast Airlines (Northeast) should provide the competitive service. *Southern Tier Competitive Nonstop Investigation,* Order 69-7-135 (July 24, 1969). Northeast's authority was, however, suspended as a result of its merger with Delta Air Lines in July, 1972. The Board thereupon initiated

[1] References to the Court of Appeals' opinion and to the Board orders will be to the appropriate appendix to the petition.

the *Miami-Los Angeles Competitive Nonstop Case* to once again determine if the public convenience and necessity required certification of a competing carrier on the route, and, if so, which carrier should be certificated. Order 72-8-95 (August 23, 1972).

The Administrative Law Judge (ALJ) handed down his Initial Decision in *Miami-Los Angeles* on June 13, 1973. The ALJ found that competitive service was still required by the public convenience and necessity and selected Pan American World Airways, Inc. (Pan American) to provide that service. The Board took discretionary review of the ALJ's decision on June 19, 1973. Review proceedings were, however, deferred pending completion of a study on the need for an environmental impact statement, which was sought by National only after issuance of the Initial Decision.

Oral argument was finally heard by the Board on April 16, 1975. In undertaking review, the Board was confronted by a record which had been developed two years earlier and based on 1971 data, the most recent available at the time of the hearing. The Board attempted to remedy this situation without initiating yet another round of hearings by electing to update the record using officially noticeable data. On the basis of this updated record, the Board affirmed the ALJ's determination that competitive service was needed on the route, but chose Western, rather than Pan American, to provide the service. App. B-2.

After the Board denied their various petitions for reconsideration, several parties, including National and Pan American, sought review by the Court of Appeals. In its June 23, 1977 opinion the Court, after rejecting various challenges to the Board's decision

which are not in issue here, considered the arguments of Pan American and National that the Board erred in updating the record without providing the parties an opportunity to participate. Pan American's challenge prevailed, but National's did not.

The Court was "persuaded by a combination of factors that fundamental fairness required the Board to give Pan American the chance to [participate in the updating process with regard to the carrier selection issue]." App. A-28. The four factors listed by the Court were the substantial length of the delay between the initial and final decisions; the fact that the adjustments to the record made by the Board operated "significantly to the detriment" of Pan American; the "plausible arguments" put forward by Pan American to refute the Board's interpretation of the changed circumstances; and the Board's apparent unexplained departure from its earlier position regarding the importance of beyond segment traffic support [2] in transcontinental cases. App. A-28-29. It is clear from the Court's opinion that "supplementation of the record" was considered necessary only because all of these factors were present. App. A-40.

With regard to National, the Court determined that the Board's updating techniques worked no harm. National was simply unable to persuade the Court that the procedures followed by the Board with regard to the need for competition issue caused it to ignore any evidence which would have supported a conclusion that

[2] A beyond segment passenger is one who uses the service in question, here Miami-Los Angeles, as part of a longer trip which originates or ends or both beyond Miami or Los Angeles. Beyond segment support measures the number of such passengers that a particular carrier can bring to a given route.

such service was unnecessary or unsupportable. App. A-29 n.15.

Having affirmed the Board's decision with regard to the need for competition, the Court of Appeals did not vacate the Board's order. Instead, the Court remanded the record to the Board to allow an "adversarial exploration" of the recent developments in the Miami-Los Angeles market which led to the selection of Western over Pan American and to allow the Board to reconsider its decision in light of the evidence so adduced. App. A-42. National's petitions for rehearing and for a stay of the Court's order were denied on August 2, 1977.

ARGUMENT

The Court of Appeals in this case implemented a limited remedy to cure a limited defect which it found in the Board's decision-making process. Petitioner's attempt to evaluate this result to a level necessitating review by this Court is both unwarranted and unsupportable. This case simply does not present any important questions of federal law, and the decision of the Court of Appeals is not in conflict with either the decision of another Court of Appeals on the same matter or with the applicable decisions of this Court.

I. The Court of Appeals Sustained the Board Decision on the Need for Competition Because It Was Reached After Proper Procedure.

National initially contends that the Court of Appeals erroneously upheld the Board's decision on the need for competition solely because it agreed with the substantive result reached by the Board, and despite substantial procedural defects. Petition at 12-13. This

argument is clearly at odds with both the reasoning and the language used by the Court below. In fact, the Board's determination in this portion of the case was sustained precisely because the Court found that no procedural defect existed.

Both National, the petitioner here, and Pan American challenged the unilateral updating of the record undertaken by the Board. It must be remembered, however, that the updating to which National objected related to the need for competition issue, while the updating to which Pan American directed its arguments related to the carrier selection issue. There are two separate and distinct inquiries involving analysis of different factors and criteria. *Delta Airlines, Inc.* v. *CAB,* 442 F.2d 730, 733 (D.C. Cir. 1970). A decision on the first issue depends on whether the market in question needs and can support additional service. Carrier selection, on the other hand, revolves around which of several applicants can provide the best service and can bring the most public benefits to the market, while, if possible, operating at a profit.

Thus, petitioner's contention that it is "inescapable" that the selective updating condemned by the Court of Appeals as to the carrier selection issue also affected the need for competition determination, Petition at 12, is, quite simply, wrong. Given the fact that the two issues are distinct, the meaning of the Court's statement that "National has not drawn our attention to any factors which indicate that procedural shortcomings caused the Board to ignore evidence suggesting a contrary outcome on the need for competition issue," App. A-29 n.15, becomes clear. The Court of Appeals is simply saying that it found no procedural problems

with the Board's consideration of the need for additional service. As described above, such a result is perfectly consistent with the Court's contrary finding as to carrier selection. The Court in no way reached its decision because of agreement with the Board's substantive result, as is claimed by National.

Contrary to National's contention, Petition at 14, the Court's opinion clearly indicates that the Court operated precisely within the confines laid out in *FPC* v. *Transcontinental Pipe Line Corp.,* 423 U.S. 326 (1976) (per curiam). Having found the decision on carrier selection "not sustainable on the administrative record made," *id.* at 331, the Court of Appeals remanded that issue. The fact that the decision on need for competition was sustainable on the agency record meant that a remand on that issue was unnecessary.

II. The Limited Remand Ordered by the Court of Appeals, and Its Retention of Jurisdiction, Did Not Improperly Intrude Upon the Board's Discretion.

National also contends that the Court of Appeals' limitation of the scope of proceedings on remand and retention of jurisdiction over the case represent an improper intrusion on the Board's discretion and signal "a massive shift of power between court and agency." Petition at 18. Once again, National has improperly interpreted the Court's actions.

Section 1006(d) of the Federal Aviation Act, 49 U.S.C. § 1486(d) provides that the Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board." The clear implication of this statute is that the Court of Appeals, having found procedural error

in only part of the Board's order, may reasonably limit the scope of proceedings on remand. "The decision whether or not to limit the scope of proceedings on remand involves the sound discretion of the reviewing court." *Braniff Airways, Inc.* v. *CAB,* 379 F.2d 453, 468 (D.C. Cir. 1967). The D.C. Circuit has, in fact, routinely remanded agency cases with limiting instructions, including both CAB cases, *see, e.g., Continental Air Lines, Inc.* v. *CAB,* 519 F.2d 944, 960 (D.C. Cir. 1975), *cert. denied sub. nom., Western Air Lines, Inc.* v. *Continental Air Lines, Inc.,* 424 U.S. 958 (1976); *Western Air Lines, Inc.* v. *CAB,* 351 F.2d 778, 783-84 (D.C. Cir. 1965), and cases from other agencies, *see, e.g., Pacific Far East Line, Inc.* v. *Federal Maritime Bd.,* 275 F.2d 184, 187 (D.C. Cir.), *cert. denied sub. nom., Matson Navig. Co.* v. *Pacific Far East Line, Inc.,* 363 U.S. 827 (1960); *Fleming* v. *FCC,* 225 F.2d 523, 526 (D.C. Cir. 1955).

This limited remand procedure is not, despite National's claim, contrary to the precedents of this Court. Unlike the situation in *FPC* v. *Transcontinental Pipe Line Corp.,* 423 U.S. 326 (1976) (per curiam), the Court of Appeals in the instant case has in no way attempted to usurp the Board's authority to decide the substantive issues involved after developing the needed evidence. In fact, the Court was careful not to enter the substantive area of the case, and instead ordered the Board to undertake an "adversarial exploration" of the developments relating to carrier selection and to reconsider its earlier decision in light of the evidence so developed. App. A-42. As to the need for competition, the Board has already made its substantive decision and the Court of Appeals has upheld the method used in reaching that decision. Further consideration by the Board is unnecessary.

The teaching of *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), is also not contradicted by the action of the Court of Appeals. In *Pottsville* the Court of Appeals, having already remanded a broadcast licensing case to the agency, attempted by mandamus to prevent the agency from consolidating the remanded application with two others filed after the improper denial of the remanded application. This Court overturned the Court of Appeals' order. Such a stage in the proceedings has simply not yet been reached here. In *Pottsville* the agency itself sought certiorari, complaining that the Court of Appeals' mandate was overly restrictive. There is no indication that the Board in any way feels that it has been similarly limited here.[3]

The First Circuit has faced such a situation in a CAB case. In *Northeast Airlines, Inc.* v. *CAB,* 345 F.2d 484 (1st Cir.), *cert. denied sub. nom., Eastern Air Lines, Inc.* v. *Northeast Airlines, Inc.,* 382 U.S. 845 (1965), the Court of Appeals remanded a Board order denying extension of Northeast's New York-Florida certificate, but retained jurisdiction over the case. On remand the Board determined that the wiser course would be to open a full route investigation and undertake a complete review of the New York-Florida market. Upon request by the Board, the Court of Appeals promptly relinquished its jurisdiction and re-

[3] In fact, the actions taken by the Board since remand demonstrate that no *Pottsville* situation will arise in this case. In Order 77-9-62 (September 16, 1977), which is attached as an appendix to this brief, the Board invited comments on the proper scope of the proceedings on remand, but indicated that "[t]he Court did not require a re-examination of the need for service question and *we see no public need for it.*" App. 3a (emphasis added). Clearly, the Board, through an exercise of its own discretion, has determined that the limited reconsideration ordered by the Court is appropriate.

manded the full case for Board action. *Id.* at 489-90. At the present stage of proceedings in the instant case, there is no reason to assume that the D.C. Circuit would not be equally solicitous of the Board's discretion and of this Court's ruling in *Pottsville.*

National goes on to claim that the Court of Appeals, by not vacating the Board's order and by retaining jurisdiction over the case pending Board action, has again entered the realm of agency discretion by engaging in what National characterizes as interim licensing. Petition at 15, 17. This contention borders on the frivolous.

The decision of the Court of Appeals to remand without vacating the Board's order is perfectly consistent with this Court's precedent. In ***Ford Motor Co.*** v. *NLRB,* 305 U.S. 364 (1939), this Court stated that it is

> familiar appellate procedure to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken. . . .

Id. at 373. And further,

> [t]here is nothing . . . which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record. . . .

Id. at 375.

This is precisely what the Court of Appeals did in the instant case. Having found procedural irregularities and deficiencies in the record regarding selection of a carrier to provide competitive service, the Court remanded the case for correction of these errors. Since the Court has not as yet ruled on the merits of the carrier selection decision, but rather is simply seeking a complete record on which to decide that question, vacation of the Board's order was in no sense necessary. To characterize the decision not to vacate as interim licensing by the Court ignores the fact that it was the Board, not the Court, which chose to certificate Western in the first place. The Court is simply allowing that Board decision to stand pending complete review based on a supplemented record.

The fact that the Court of Appeals also retained jurisdiction over the case does not alter this conclusion. Under Rule 13(d) of the D.C. Circuit, retention of jurisdiction simply allows the Court to review the Board's decision after reconsideration without requiring the partics to file new petitions for review. Such action certainly does not threaten "a massive shift of power between court and agency," Petition at 18, and in fact represents a laudable effort by the Court to bring this already lengthy case to as speedy a final disposition as possible consistent with procedural fairness.

CONCLUSION

WHEREFORE, Respondent respectfully submits that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 2, 1977

APPENDIX

APPENDIX

Order 77-9-62

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

Washington, D.C.

[SEAL]

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 16th day of September, 1977

Docket 24694

MIAMI-LOS ANGELES COMPETITIVE NONSTOP CASE

ORDER REOPENING PROCEEDING

Background

On March 15, 1976, the Board issued its decision in this case authorizing Western Air Lines to compete with National Airlines over a Miami-Los Angeles nonstop route. In so doing, the Board affirmed the decision of the administrative law judge that the market needs, and can support, competitive service. The Board, however, reversed the judge's selection of Pan American as a competitive carrier.[1] Requests for reconsideration and stay of that decision were denied on June 16, 1976.[2]

The Board's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit by National, Pan American, and two other losing applicants, Delta Air Lines and American Airlines. On

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[1] Order 76-3-93.

[2] Order 76-6-120.

June 23, 1977, the court issued its decision and remanded the record in the case to the Board "for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American. . . ." *Delta Air Lines, Inc. et al.* v. *C.A.B. (Miami-Los Angeles Route)*, No. 76-1241 *et al.* (D.C. Cir., filed June 23, 1977), slip opinion p. 42. The court was concerned that substantial delay had occurred between the close of the record and the issuance of the Board's decision, that Pan American had persuasively argued that the Board's updating of the record had operated significantly to the detriment of that carrier, and that the Board's consideration of beyond-segment services as a carrier selection criterion may have constituted a departure from its 1969 decision involving the same market. Specifically, the court directed the Board to "give Pan American a chance to submit its own version of changes in circumstances occurring between 1973 and 1976 and to comment upon the relevance of those changes to the award of Miami-Los Angeles route authority." Id. at 28.

In all other respects the Board's decision was upheld. The court observed that of the various contentions pressed upon it, only three warranted discussion and concluded that, as to two of the contentions—namely, Delta's argument that it was entitled to priority by reason of its 1972 merger with Northeast Airlines, and National's challenge to the Board's alleged failure to comply with the Energy Policy and Conservation Act of 1975—the Board's disposition should not be disturbed. Id. at 3-4. National Airlines filed a petition for a stay of the court's decision pending rehearing *en banc* or the filing of a petition for certiorari. On August 2, 1977, the court denied National's requests, saying:

> "It is also desirable that the proceedings on remand be carried on as expeditiously as possible, as the Board represents its purpose to do." *Delta Air Lines, Inc.* v. *CAB*, No. 76-1241 (D.C. Cir., filed August 2, 1977).[3]

Discussion

We have decided to solicit comments from all parties with respect to the proper course of action for the Board to follow in light of the court's remand.[4] In order to focus the comments, we believe it useful to set forth two specific questions on which the Board wishes comments.

First, we want parties to comment on the scope of the remand required by the court's decision. The court did not require a reexamination of the need for service question and we see no public need for it. As to the carrier selection question, we note that the court's decision appears to have directly required only that the Board "give Pan American a chance to submit its own version of changes in circumstances occurring between 1973 and 1976 and to comment upon the relevance of those changes to the award of Miami-Los Angeles route authority." *Delta Air Lines, Inc. et al.* v. *(C.A.B. Miami-Los Angeles Route)*, *supra*, slip opinion p. 28.[5] We wish the parties to address the Board's power to reopen the

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[3] The Court's mandate was issued on August 9, 1977. A copy of the Court's August 2 order is attached.

[4] On July 1 and July 18, Eastern Air Lines filed motions urging the Board to reopen the case for further evidentiary hearings on new applications from all carriers and to hold such hearings in Miami. Answers to Eastern's motions are due shortly.

[5] We assume that this directive includes according Western a reasonable opportunity to submit its version of recent events as well. We note, however, that the court, in discussing the general question of the updating of the record, observed that both National and Pan American challenged this updating. The court, however, rejected National's claim that it had been prejudiced and did not require the Board to accord National (and presumably others) an opportunity for a further presentation to the Board. See slip opinion, n. 29, note 15.

case for a *de novo* examination of the question of carrier selection where the court remands only the record. Our tentative view is that this would be neither necessary nor desirable. The Board's original decision makes clear our opinion that, from the perspective of the traveling and shipping public, no carrier appears likely to provide appreciably better service than Western or Pan American.[6] Furthermore, it must be recognized that this matter has already occupied our attention for about a decade, and that a commitment of Board resources to a re-trial of this case would necessarily compromise the Board's concurrent ability to emply [*sic*] these same resources to examine the needs of other markets as well as other novel and important regulatory matters now facing the Board for the first time. Nonetheless, we do not foreclose a fuller reexamination of the carrier selection question if warranted.[7]

Second, whether this case is limited to the question of carrier selection as between Western and Pan American (or, perhaps, an award to both), or is more broadly reviewed, we wish the parties' views as to whether the Board could or should proceed under an expedited schedule which would eliminate a new trial and a new initial decision. In the *Service to Saipan Case*, Docket 24421, and the *Service to Richmond Case*, Docket 24412, the Board entertained evidentiary exhibits, rebuttal material, and briefs, but did not hold a further oral evidentiary hearing or require the filing of an initial decision. The

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[6] See Order 76-3-93, pp. 19-22. The court will allow Western's continued operation during the pendency of any remand proceeding and we recognize that, as a result, the traveling and shipping public will not be deprived of needed service during the pendency of any remand.

[7] Eastern Air Lines has filed a request that the Board reopen the entire carrier selection issue and hold further hearings in Miami. Pan American has filed an answer in opposition; answers were due September 9, 1977.

Board was able to complete the *Saipan* case in under six months and was able to complete the *Richmond* case in just over four months. See Order 75-11-59, served November 17, 1975, and Order 76-6-171, decided May 7, 1976 (*Saipan*); and Order 76-11-131, served November 30, 1976, and Order 77-4-29, decided April 6, 1977 (*Richmond*).

ACCORDINGLY, IT IS ORDERED THAT: Comments in response to this order shall be filed within 14 days from service and reply comments shall be due 7 days later.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

[SEAL]

All Members concurred.